IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 30TH OCTOBER 2007 / 8TH KARTHIKA 1929

Crl.Rev.Pet.No. 1088 of 2007()

CRMP. 5129/2006 of CHIEF JUDICIAL MAGISTRATE COURT, TRIVANDRUM
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REVN. PETITIONER: PETITIONER

C.R.SINDHU, AGED 36,
W/O.S.H.ANI, PANKINI HOUSE, T.C.NO.61/2038,
BNA 94, MANAKKAD P.O., THIRUVANANTHAPURAM-9.

BY ADV. SRI.C.S.MANU

RESPONDENTS:
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1. STATE OF KERALA, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

2. STATE BANK OF TRAVANCORE, KESAVADASAPURAM BRANCH, THIRUVANANTHAPURAM, REP. BY ITS MANAGER.

3. AUTHORISED OFFICER, CHIEF MANAGER, STATE BANK OF TRAVANCORE, KESAVADASAPURAM BRANCH, THIRUVANANTHAPURAM.

4. DR.P.L.REJITLAL, T.C.61/2038, BNR 94, BALAVAN NAGAR, IRUMKULANGARA, MANACAUD, THIRUVANANTHAPURAM, WORKING AS CHAIRMAN, RITHS TRUST, REJITLAL INSTITUTE OF TECHNOLOGY & HEALTH SERVICE, PATTOOR, VANCHIYOOR, THIRUVANANTHAPURAM.

5. K.BABU, ADVOCATE, KERALA LAW CHAMBER BUILDING, VANCHIYOOR, THIRUVANANTHAPURAM. ADV.COMMISSIONER IN CRL.M.P.NO.5129/06 ON THE FILES OF THE CHIEF JUDICIAL MAGISTRATE'S COURT, THIRUVANANTHAPURAM).

BY ADV. SRI.SATHISH NINAN
SRI.SANTHOSH MATHEW
SRI.M.RAMESH CHANDER
PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 25/10/2007, THE COURT ON 30/10/2007 PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.R.P. NO. 1088 of 2007

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Dated: 30-10-2007

ORDER

In this revision filed under Sec. 397 read with Sec. 401 Cr.P. C. the revision petitioner challenges the order dated 22-2-2007 passed by the Chief Judicial Magistrate, Thiruvananthapuram in C.M.P. 5129 of 2006 appointing an Advocate Commission to take possession of 12.43 cents of land situated in Survey Nos. 317/A3, 318/B 4 and 318/B7 of Muttathara Village in Thiruvananthapuram Taluk together with the residential building thereon bearing No. T.C. 61 of 2038 and to handover the said property to the authorised officer (Chief Manager), Kesavadasapuram branch of the State Bank of Travancore on or before 13-3-2007.

2. I heard Advocate Sri. C.S. Manu, the learned counsel appearing for the revision petitioner and Advocate Sri. Satish Ninan the learned Counsel appearing for respondents 2 and 3 and Advocate Sri. Ramesh Chander, the learned counsel appearing for the 4th respondent.

REVISION PETITIONER'S CONTENTIONS

3. Advocate Sri. C.S. Manu the learned counsel appearing for

the revision petitioner made the following submissions before me in support of the revision:-

The revision petitioner (C.R. Sindhu) is the owner of 12.43 cents of land together with the residential building thereon referred to above. In the year 2002 she borrowed a sum of Rs. 6, 50,000/- from the 4th respondent (Dr. P.L. Rajitlal) and towards security for the said loan she mortgaged the aforesaid property to the 4th respondent by executing a mortgage by conditional sale. The undertaking was that the revision petitioner would repay the loan within a maximum period of six years whereupon the 4th respondent would reconvey the property to the revision petitioner. The possession of the property was, however, retained with the revision petitioner. It appears that the 4th respondent had availed of a loan of Rs. 5,20,000 from the Kesavadasapuram branch of the State Bank of Travancore and had offered the aforementioned property by way of equitable mortgage. The 4th respondent thereafter committed default in paying the loan to the bank whereupon proceedings were initiated by the bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the "Securitisation Act" for short). The bank moved the Chief Judicial Magistrate, Thiruvananthapuram under Section 14 (1) of the Securitisation Act for assistance to the bank in

taking possession of the above property which is in the possession of the revision petitioner. Eventhough the transaction between the revision petitioner and the 4th respondent was a loan transaction evidencing a mortgage by conditional sale, it appears that the document which was actually got executed by the revision petitioner was a sale deed as per which the 4th respondent obtained an absolute transfer of the aforementioned 12.43 cents of land together with the building. But the revision petitioner was made to believe that it was a mortgage deed. She will be instituting a civil suit against the 4th respondent for appropriate reliefs against the fraud practiced by him on the revision petitioner. The learned Chief Judicial Magistrate can be moved under Sec. 14 of the Securitisation Act by the secured creditor for taking possession of a secured asset only. The Chief Judicial Magistrate was bound to satisfy himself as to whether the property is a secured asset or not. Similarly, the Chief Judicial Magistrate was bound to satisfy himself that the secured asset was in the possession of the borrower. Here the property is in the possession of the revision petitioner pursuant to the loan transaction between her and the borrower. Hence, the bank was not entitled to take possession of the property from the revision petitioner with whom the bank has no privity of contract. At best , the bank could

take only symbolic possession of the property from which the revision petitioner cannot be dispossessed. The proceedings before the Chief Judicial Magistrate who is approached by the secured creditor for assistance is a judicial proceeding in which in appropriate cases the Chief Judicial Magistrate may refuse to assist the secured creditor to take possession of the secured asset. Hence, in the absence of exclusion of the principles of natural justice either expressly or by necessary implication, the Chief Judicial Magistrate is bound to hear persons who will be affected by his orders to take possession of the property. The consequence of the impugned order is to denude the revision petitioner of her possession of the property in a proceeding taken behind her back and without giving her an opportunity of being heard. Neither the bank nor its authorised officer has any authority or power to proceed against the property in the possession of the revision petitioner for realisation of a debt due from the 4th respondent herein. The petitioner reasonably apprehends that the 4th respondent had fraudulently availed of the loan from the 2nd respondent bank in collusion with certain officers of the said bank by offering as security the property of which the revision petitioner is the absolute owner in possession. If the Chief Judicial Magistrate had taken care to ascertain the person who is in actual possession of the

property, he would not have issued the impugned order. The Chief Judicial Magistrate was bound to adjudicate all these questions before granting the prayer of the bank. The impugned order has been passed without proper application of mind and in gross violation of the principles of natural justice.

JUDICIAL RESOLUTION

4. I am afraid that I cannot agree with the above submissions made on behalf of the revision petitioner.

THE FACTUAL MATRIX

5. The facts leading to the present revision petition can be summarised as follows:-

12.43 cents of land and the building thereon referred to earlier above admittedly belonged to the revision petitioner, C.R.Sindhu. The 4th respondent (Dr. P.L. Rejitlal) who was desirous of purchasing the said property, availed of a loan of Rs. 5,20,000/- from the 2nd respondent bank (Kesavadasapuram Branch of State Bank of Travancore) and purchased the said property from the revision petitioner as per registered sale deed No. 3739 of 2002 dated 16-11-2002. The consideration paid by the 4th respondent herein to the revision petitioner was Rs. 6,00,000/-. On the same day, the revision petitioner handed over the prior title deeds namely settlement deed

No. 3032 of 1992, sale deed No. 1424 of 1987, partition deed No. 3656 of 1997, release deed Nos. 2630, 2631 and 2632 of 1967 to the 4th respondent. Pursuant to the sale deed the 4th respondent also effected mutation of his name in the revenue records and also paid tax in respect of his property on 20-11-2000. The very same property was equitably mortgaged by the 4th respondent in favour of the 2nd respondent bank while availing of the above loan for purchasing the property. The loan amount of Rs. 5,20,000/- which was the sale consideration for the transaction between the 4th respondent and the revision petitioner was directly paid by the 2nd respondent bank to the revision petitioner vendor by means of an office cheque which was encashed by the revision petitioner through her S.B. Account No. 1191 of the very same Kesavadasapuram branch on 16-11-2002. The prior title deeds of the revision petitioner/vendor, the tax receipts in the name of the 4th respondent purchaser, a possession certificate dated 20-11-2002 issued by the Village Officer Muttathara to the effect that the 4th respondent purchaser is in his possession of the property in question etc. were handed over by the 4th respondent/loanee to the 2nd respondent bank. The 4th respondent committed default in paying the instalments due to the bank. Since the 4th respondent borrower had executed a security agreement with the second respondent bank

which is a secured creditor in respect of the aforementioned property which is a secured asset, the bank initiated proceedings under the Securitisation Act. In spite of a notice under Sec. 13 (2) of the Securitisation Act the 4th respondent borrower did not settle the dues to the bank. The 3rd respondent who is the authorised Officer (the Chief Manager) of the 2nd respondent bank, gave a written request to the Chief Judicial Magistrate, Thiruvananthapuram to take possession of the aforementioned property which is a secured asset by recourse to Section 14 of the Securitisation Act. It was in pursuance of the said request that the Chief Judicial Magistrate appointed Advocate Sril K. Babu as the Commission to take possession of the property after identifying the same with the assistance of the 3rd respondent authorised officer of the 2nd respondent bank and to hand over the property to the said authorised officer. It was really an assistance given by the Chief Judicial Magistrate to the 2nd respondent secured creditor for taking possession of the secured asset in terms of sub section 2 of Section 14 of the Securitisation Act.

JUDICIAL RATIOCINATION

6. According to the revision petitioner she was actually availing of a loan of Rs. 6,00,000/- from the 4th respondent on 16-11-2002 but she was made to believe that the document which was

being executed was a mortgage by conditional sale giving her the option to discharge her liability towards the 4th respondent within six years whereupon the 4th respondent would reconvey the property to her. She would have it that it was only in the year 2007 that she discovered that the document which was executed by her was an outright sale deed in favour of the 4th respondent. Admittedly, she has not so far approached the competent civil court with a suit for declaration that the sale deed dated 16-11-2002 executed by her was in fact a mortgage deed and that the sale deed so got executed was vitiated by fraud or misrepresentation or any of the other vitiating factors. She has absolutely no explanation as to how the 4th respondent came into possession her prior title deeds which have been handed over to the 2nd respondent bank by the 4th respondent while availing of the loan. If the transaction between the revision petitioner and the 4th respondent was really a loan transaction, there was absolutely no need for her to handover the prior title deeds of the properties to the 4th respondent. When the sale deed recites handing over of possession to the vendee the 4th respondent who has also effected mutation of the revenue registers and has paid land revenue on his own account and has also obtained possession certificate from the village Officer, Muttathra to the effect that he is in actual

possession of the property, the claim of the revision petitioner that, she continues to retain possession of the property does not appear to be true at all.

7. There is absolutely no merit in the contention of the revision petitioner that the chief Judicial Magistrate acting under Sec. 14 of the Securitisation Act is bound to issue notice to the person in possession of the secured asset and to adjudicate the claims if any of such person. Equally misconceived is the contention that the Chief Judicial Magistrate acting under Section 14 of the Act is bound to follow the principles of natural justice. The argument advanced by the revision petitioner stems from a misconception regarding the purpose and intendment of the Securitisation Act. It was felt that unlike International bankers, the banks and financial Institutions in India do not have the power to take possession of securities and sell them. It was noticed that the pre-existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms resulting in the slow pace of recovery of defaulting loans and the consequent mounting levels of non-performing assets of banks and financial institutions. It was to enable the banks and financial institutions to realise their long terms assets, manage the problem of liquidity, asset liability

mismatches and improve recovery by exercising powers to take possession of the securities and sell them and reduce the non-performing assets by adopting measures for recovery or reconstruction etc. that the Parliament enacted the Securitisation Act as Central Act 54 of 2002.

8. A reading of the statutory scheme of the Securitisation Act will go to show that consequent on the default committed by a borrower the secured creditor is given the right to enforce the security interest created by the borrower in favour of the secured creditor by having recourse to the provisions of the Act. Section 13 of the said Act indicates that the above right given to the secured creditor is notwithstanding the provisions contained in Sections 69 and 69 A of the Transfer of Property Act, 1882. Consequent on the default committed by a borrower the secured creditor may require the borrower by a notice in writing under Sec. 13 (2) of the Act to discharge in full his liability to the secured creditor within 60 days of the date of notice failing which the secured creditor is given the authority to exercise all or any of the rights provided under sub Section 4 of Section 13. Sub section 4 of Sec. 13 gives the secured creditor the right to take recourse to any one or more of the four measures enumerated thereunder for the purpose of recovering the

secured debt. One such measure is to take possession of the secured asset of the borrower. The said provision does not envisage any notice either to the borrower or to any other person before the secured creditor takes possession of the secured asset. The right given to the secured creditor by section 14 of the Act is a right to move the Chief Metropolitan Magistrate or a District magistrate for assistance to the secured creditor in taking possession of the secured asset. Instead the secured creditor itself taking possession of the secured asset it can make a request to the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction the secured asset is situated to take possession of the said asset and forward the same to the secured creditor. In the light of the decision of this Court in ***Solaris Systems Private Limited and another v. Oriental Bank of Commerce reported - ILR 2006 (2) Kerala 645*** *with regard to a* non - Metropolitan area, the Chief Judicial Magistrate concerned stands on the same footing as that of the Chief Metropolitan Magistrate.

9. The object of the Securitisaction Act is to accelerate the process of recovery of debts and to remove the obstacles in the way of realisation of debts enabling recovery of debts by a non-adjudicatory process. (See Transcore v. Union of India and another – AIR 2007 SC

712). The strong bias of the legal fraternity towards the adversarial litigation paved the way for the de-generation of the regular civil courts where delay and digression defeat the justice delivery process. Technical hairsplitting has become the bane of our law courts giving rise to cynicism among the public at large over the interminable delay in civil litigation. It was to provide for liquidation of secured assets on a war footing that the Parliament enacted the Securitisation Act for quicker remedies to Banks and Financial Institutions through a non-adjudicatory process. The Act proceeds on the basis that the liability of the borrower to repay the secured debt has crystallised and it is to remove all fetters on the rights of the secured creditor to choose one or more of the cumulative remedires under the Act that the provisions are geared in such a way that the recovery of the dues to the banks and financial institutions is not delayed by any adjudicatory process in preference to the existing forum which breeds delay. Thus, when a secured creditor who is entitled to possession of the secured asset by virtue of Sec. 13 (4) (a), makes a written request under Sec. 14 (1) of the Act to the Chief Judicial Magistrate, what the Chief Judicial Magistrate does is only to assist the secured creditor in taking possession of the secured asset and handing it over to the secured creditor. Sec. 14 of the Act reads

as follows:

> "14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset:- (1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall on such request being made to him-
>
> (a) take possession of such asset and documents relating thereto; and
>
> b) forward such assets and documents to the secured creditor.
>
> (2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate of the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may be, in his option, be necessary.
>
> 3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority".

A reading of the Section indicates that while it is optional for the secured creditor to request the Magistrate for assistance, the Magistrate, on such request, has no option except to take possession of the asset and hand it over to the secured creditor.

The use of the expression "shall" after the words "District Magistrate' towards the end of sub Section (1) indicates that when a request is made by the secured creditor, the Magistrate is bound to take possession of the asset and hand it over to the secured creditor. The Magistrate has no discretion in the matter and he is not expected to pass any order except to take possession of the asset and hand it over to the creditor. The very fact that this function is entrusted with the Magistrate indicates that resistance if any, in the act of taking possession of the asset can be easily got over by calling into aid the police power of the State. Sub section 3 of Sec. 14 indicates that the said **act** (not "order") of taking possession of the asset by the Chief Judicial Magistrate is not justiciable and it shall not be called in question in any court or authority.

9. It is not as if persons who are aggrieved by the act of taking possession are left without any remedy. Under Sec. 17 of the Securitization Act any person including the borrower aggrieved by any of the measures referred to in sub section 4 of Sec. 13 taken by the secured creditor or his authorised officer can prefer an application after paying the prescribed fee to the Debt Recovery Tribunal (D.R.T for short) within 45 days of any such measure. If the D.R.T. comes to the conclusion that possession of the asset taken by the

secured creditor was not in accordance with the provisions of the Act and the Rules it can even direct restoration of possession of the assets to the borrower by virtue of the power under sub section 3 of Sec. 17. Even though Sec. 17 describes of the remedy of the applicant as a right of appeal, it is now well settled that the process envisaged by the said provision is in reality an adjudication. Section 19 of the Securitisation Act indicates that in appropriate cases the DRT can award compensation to the borrower from whom possession was taken improperly. Any person aggrieved by the order of the D.R.T. under Section 17 is given a right of appeal to the Appellate Tribunal under Section 18 of the Securitisation Act. The Appellate Tribunal is also invested with the same powers as that of the D.R.T. Thus, when the person aggrieved has got a right to have his grievance adjudicated upon by a Tribunal whose orders are subject to further appeal, it is futile for the revision petitioner to contend that the Magistrate acting under Sec. 14 of the Act was bound to give notice to the revision petitioner before taking possession of the asset.

THE CONCLUSION

10. Thus, in summing up, the legal position is that while dealing with a written request made by a secured creditor under Sec. 14 of the Securitisation Act, the Chief Judicial Magistrate is not

required to give notice or an opportunity of being heard either to the borrower or to any person who may be in possession of the secured asset. I am fortified in this view by a decision of the Division Bench of the Bombay High Court in ***Trade Well v. Indian Bank - 2007 Crl.L.J.2544.***

The result of the forgoing discussion is that this Revision is devoid of any merit and is accordingly dismissed.

V.RAMKUMAR, JUDGE.

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